

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

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75-8333

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To be argued by
JOSEPHINE Y. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-8333

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERTA WADDELL,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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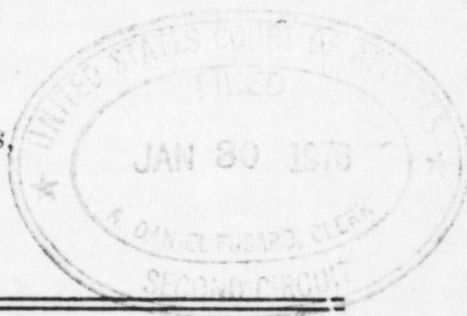


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-8333

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERTA WADDELL,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Roberta Waddell appeals from an order of the United States District Court for the Eastern District of New York (Dooling, J.) entered on September 15, 1975 denying her Rule 35 motion for reduction of sentence.

On March 14, 1975, appellant pled guilty to Count One of an indictment charging her with conspiracy to import cocaine into the United States with intent to distribute it and to conceal the existence of said conspiracy. (Title 21, U.S.C., 841(a)(1), 846, 952(a), 960(a)(1) and 963).

On May 9, 1975, appellant was sentenced to a term of confinement of 5 years under Title 18, U.S.C., § 4208(a)(2). A motion to reduce sentence was made pursuant to Rule 35 on August 8, 1975. That motion was denied and on September 15, 1975; appellant was resentenced to a five year term with a special parole period of three years.

The appellant now asks this Court to remand the case to a different District Court Judge for resentencing on the grounds that the sentencing court failed to consider probation as an alternative to confinement, failed to recognize her rehabilitation and cooperation with the Government and prejudicially based its sentence on an alleged erroneous statement in the presentence report.

Statement of the Case

A. Proceedings below.

Upon her arrival from Buenos Aires, Argentina on August 1, 1973, Roberta Waddell was arrested at John F. Kennedy International Airport with 13.2 pounds of cocaine concealed in two false bottomed suitcases. On a previous occasion, June 5, 1973, she entered the United States transporting 10 pounds of cocaine from Buenos Aires, Argentina. At that time she was not apprehended.

Mrs. Waddell, in collaboration with her indicted co-conspirator, Armando Margulis, financed and participated in planning the importation and distribution of the controlled substance. Appellant asserts that when Margulis observed her arrest at the airport, he went to her apartment, removed \$50,000 from the safe and all accounts pertaining to the cocaine transaction. It is speculated that Margulis thereupon left the United States. He is a fugitive at this time.

The Grand Jury returned a two count indictment on November 29, 1973, against Roberta Waddell and Margulis, charging them in Count One with conspiring to import and possess cocaine with intent to distribute it and with concealing their conspiracy, and in Count Two with knowingly and intentionally importing thirteen pounds of cocaine hydrochloride, a Schedule II narcotic

drug controlled substance. (Title 21, United States Code, Sections 846, 963, 952(a), 960(a)(1); Title 18, United States Code, Section 2).

On March 14, 1975, defendant Waddell pled guilty to Count One of the indictment. The court accepted the plea after satisfying itself through a careful interrogation of defendant that there was a factual basis for the plea and that it was knowingly and voluntarily made without threat or promise (Plea minutes, March 14, 1975, A. 8a-18a). The second count of the indictment was dismissed as to Mrs. Waddell (A. 60a).

At the sentencing proceeding of May 9, 1975, before the Honorable John F. Dooling, Jr., counsel for Mrs. Waddell called the attention of the Court to inaccuracies in the presentence report. He especially contested the probation office's evaluative summary describing his client as the primary participant in the conspiracy to import cocaine. Counsel also emphasized his client's cooperation, efforts at rehabilitation and the hardship to her family.

After affirming "that everything that has been said here has been taken into account in mitigation . . ." (A. 28a), the Court sentenced Mrs. Waddell to a prison term of five years.

Thereafter, counsel for appellant moved for a reduction of sentence pursuant to Rule 35. At the hearing on the motion on August 21, 1975, counsel for appellant again articulated the reasons he believed should persuade the court to revise its original decision. After an extended colloquy and the court's repeated assurance that he was taking into account all the statements made on Mrs. Waddell's behalf, he imposed a sentence of five years in custody and added the mandatory three year parole term which, inadvertently, had not been previously imposed.

B. Summary of arguments.

Appellant appeals from the sentence and asks this Court to remand the case to a different District Court judge for resentencing. In its broadest expanse, appellant's argument exhorts the court to discard its practice of limited review of sentencing. More finitely, appellant urges that the court should order a resentencing in this particular case because the presentence report contained a "highly prejudicial" error which had "an inevitable adverse impact on the judge" (Appellant's Brief at 23). Appellant also argues that the judge failed to consider the positive factors which should have persuaded him to impose a sentence of probation and misperceived the effect of sentencing under Title 18, United States Code, Section 4208(a)(2).

The United States contends that the District Court was fully aware of and gave due consideration to all factors respecting appellant's background, circumstances and participation in the illegal importation of cocaine and that the sentence imposed was the product of an informed discretion which this Court should affirm.

ARGUMENT

POINT I

The policy of the federal appellate courts, reposing broad discretionary powers in the trial judge to determine the proper sentence in each case, rests on sound principles of judicial administration and should not be abandoned.

The appellant invites this Court to renounce its practice of limited review of sentences and, by implication, to examine the facts *de novo* in each appellate case which raises the terms of a sentence as an issue. The course suggested by the appellant may be an improvident if not impossible added burden for appellate courts to assume. They rely upon the judgment, expertise, and impartiality of the trial judge in conducting trials, accepting pleas and imposing sentences.

The United States Supreme Court has recently restated the principle recognized in *Gore v. United States*, 357 U.S. 386, 393 (1958) and *Townsend v. Burke*, 334 U.S. 736, 741 (1948) and adhered to by this Circuit, that "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424, 436 (1974); see also *United States v. Tucker*, 404 U.S. 443, 446 (1972); *United States v. Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970); *Woolsey v. United States*, 478 F.2d 139, 142 (8th Cir. 1973).

Alternatively, appellant urges that this Court formulate guidelines for District Court judges and adopt the ABA Standards for Criminal Justice,¹ in particular, the

¹ American Bar Ass'n Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (1968).

position that preference be given to a sentence which does not involve confinement.²

This Court is fully aware of the difficulties inherent in the sentencing process.³ Whether or not formal guidelines should be developed is a matter of policy for the Court. Suffice it to say that in the instant case, the record supplies no reason to believe that the trial judge did not *sua sponte* follow the basic principles of fairness and justice in arriving at appellant's sentence. Furthermore, in the Eastern District, the sentencing judge consults with the other two members of the sentencing panel and thus has the benefit of collegial advice before making his determination. *United States v. Driscoll*, 496 F.2d 252, 253 (2d Cir. 1974).

POINT II

The sentence imposed on appellant is in all respects proper and the product of the informed discretion of the trial judge.⁴

The balance of appellant's contentions relate to the actual sentence imposed by the trial judge. Counsel avers that the court failed to exercise its discretion, inadequately credited her cooperation with the prosecution, misunderstood the effect of a sentence under 18 U.S.C. § 4208(a)(2) and prejudicially relied on errors in the presentence report. We examine these objections *seriatim*.

² *Id.* at 15, 67-69.

³ Kaufman, Ch.J., "The Sentencing Process and Judicial Inscrutability," 49 St. John's L.Rev. 215 (1975); Devitt, "How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?," 41 F.R.D. 249 (1967); Rubin, "Disparity and Equality of Sentences—a Constitutional Challenge," 40 F.R.D. 55 (1966).

⁴ Answering appellant's contentions in Points II and III of her brief.

In *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959), the United States Supreme Court observed that the "exercise of a sound discretion" requires "consideration of all the circumstances of the crime. . . ." This court has found that discretion was not exercised where "the court employed a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis." *United States v. Schwartz*, 500 F.2d 1350, 1352 (2d Cir. 1974). See also *Woolsey v. United States*, 478 F.2d 139, 144 (8th Cir. 1973).

Appellant asks this Court to deduce that Judge Dooling employed a "fixed and mechanical approach" (Appellant's Brief at 14) from his remark that he had "no other alternative but to sentence you to prison" (*Id.* at 28). This statement, in appellant's interpretation, establishes that the trial judge failed "to consider the possibility of a probationary sentence" (Appellant's Brief at 14).

Yet, placed in the context of the entire colloquy at the first sentencing proceeding (May 9, 1975) the statement supports quite the opposite conclusion. It followed a lengthy statement by appellant's counsel marshalling the mitigating factors to be considered in imposing a sentence: her cooperation, rehabilitation, good background, her children's need for her companionship, and it was prefaced by expression of the court's grave concern in sentencing those convicted of drug offenses.

It was in consideration of the serious character of the crime that the court remarked: "I cannot put you on probation. It would be violating the temples of justice to do it" (A. 28a). Clearly, the court was mindful of alternatives in sentencing and was anguished at the prospect of sending appellant to jail. However, after taking "everything that has been said here . . . into ac-

count in mitigation . . ." (*id*), he imposed the sentence he believed to be just. Surely, "it was not imposed without regard to the appellant's case individually." (*United States v. Baker*, 487 F.2d 360, 361 (2d Cir. 1973)).

Appellant argues that the Court in imposing a sentence under 18 U.S.C. 4208(a)(2) was mistaken as to its effect. As foundation for this assertion, counsel emphasizes one remark of Judge Dooling—"I'm sure the parole authorities in this case, to release the person who is imprisoned can release her literally at any time." (Appellant's Brief at 18, A. 47a). Thus, appellant would have this Court remand for resentencing on the ground that the trial court expected Mrs. Waddell's period of confinement, under the five year sentence, to be minimal.

The full text of the Court's commentary on this point refutes appellant's contention:

(Mr. Rooney): I know you gave her a two year (sic, an (a)(2)) sentence, but I must scrutinize that and point out that it doesn't seem to me to be much of a——

The Court: I must disagree with that.

It carries a lot of weight with the prison authorities.

It is perfectly true that in an effort to bring about this sort of a sentence I think everyone agrees and I am not entirely unfamiliar with the sentencing procedures and the uniformity in custodial treatment, but what you might call individual appropriate treatment. Custodial treatment which would take into account among other things the gravity of the offense. The previous history of the Federal system in granting parole, the guidelines seems to set up a rigidity of structure which appears to me, for example, a single such

case as this to a level of gravity which is usually visited with or usually followed by imprisonment for a period of some months, some many months.

There are various scales of evaluation from a guideline point of view and it falls in and is modified by the background factors, first offender and all those things which do have a modulating effect on the application of the guidelines.

In addition to that there is an overall responsibility of the parole board under the statute to consider matters which make it a case for early release. And those of course include whether or not there is compatibility with the interest of society.

Whether her release would be accompanied by a very low probability of return to criminal activity and whether the person to be freed has a landing place. If she has a place to go and a place in society to resume.

Now all of these things are mandatorily trained on the parole considering mind and that's what the (a) (2) sentence is suppose to do, but under the decisions in this thinking I think we will see increasingly in other Courts, particularly under our present chief of parole, I forgot what his name is, Mr. Zeigler is in charge of the entire parole system and has regionalized and done other things of that sort.

I think we can, with some confidence, expect that things like (a) (2) sentence is well aware of the appropriate effect which it impowers.

I'm sure the parole authorities in this case, to release the person who is imprisoned can release her literally at any time.

Now on a July surrender I would question whether the first parole interview has yet taken place.

I think it could be expected late August, maybe not.

These comments reveal a clear understanding on the part of the Court that a custodial sentence and eligibility for parole must be determined on a highly individualized basis, taking into consideration the gravity of the offense, whether the defendant is a first offender, the interests of society, "the probability of return to criminal activity," whether the offender has "a place to go and a place in society to resume."

Later in the hearing on appellant's Rule 35 motion, the Court returned to a discussion of sentences under 4208(a)(2) attesting to his knowledge of the factors influencing a determination of parole eligibility (A. 50a-53a).

Appellant refers this Court to its recent decision in *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975) as authority for reversing the district court's denial of the motion to reduce sentence. Judge Moore in his opinion noted at the threshold that: "ordinarily the disposition of the [Rule 35] motion is within the sound discretion of the district judge, and the scope of appellate review is quite narrow." (*Id.* at 1226; see also *United States v. Jones*, 444 F.2d 89, 90 (2d Cir. 1971)). However, in *Slutsky*, this Court did remand for resentencing. The basis for that decision was that at the time the motion for reduction of sentence was denied by the trial court (July 24, 1974) the judges of this Circuit lacked knowledge of the substantial reliance by the Board of Parole on guidelines it had issued in 1974 (28 C.F.R. § 2.20, see Appendix to *Slutsky*, 514 F.2d at 1230). Judge Moore

observed that application of the Board's guidelines to the particular facts in *Slutsky*, would deny appellants parole consideration until one-third of their sentences had been served. The court assumed that the judge at the time he imposed the sentence in March 1973 and when he denied the motion for reduction in July 1974 expected that a 4208(a)(2) sentence would permit an earlier release of the appellants than a regular 4202 sentence.

The facts in the instant case present a different situation.⁵ Judge Dooling was well aware of the Parole Board's guidelines. He referred specifically, at the Rule 35 hearing, to the "modulating factors and the table" (A. 52a). Whether the Parole Board's guidelines as initially issued subverted or faithfully implemented the purpose of 4208(a)(2) sentences is not the issue. Appellant has taken his stand on the ground that Judge Dooling misperceived the effect of a 4208(a)(2) sentence. The record clearly demonstrates that he did not.

Furthermore, in *Grasso v. Norton*, 520 F.2d 27 (2d Cir. 1975), this Court considered the revision of the Board of Parole Rules (28 C.F.R. § 14(b), June 5, 1974) providing that a prisoner with a sentence of two or more years under section 4208(a)(2) who at an initial hearing is continued to a date later than one-third of his sentence shall after serving one-third of his sentence receive a review on the record by an examiner panel. Judge Bryan stated:

As we view it, the combination of the initial institutional hearing and the file review on the

⁵ To be distinguished also is *Grasso v. Norton*, 520 F.2d 27 (2d Cir. 1975) in which parole was denied defendant at the initial parole hearing and he was instructed that he would be required to serve his full sentence without any future parole hearing. The Parole Board's guidelines are discussed at 34-37.

record at the one-third point of the sentence provided by revised 28 C.F.R. § 214(b) gives the (a) (2) prisoner as effective and meaningful parole consideration as is afforded the non (a) (2) prisoner by the institutional hearing given when one-third of his sentence has expired. This is all that 18 U.S.C. 4208(a) (2) requires (520 F.2d at 36-37).

The record in the instant case contains nothing to indicate that the revised guidelines of the Board of Parole, as understood by this Court and determined in *Grasso* to be within the Board's statutory authority will not be applied to the appellant.⁶ Mrs. Waddell has not been denied parole consideration. What disturbs counsel is that under the Parole Board's guidelines, see *Slutsky, supra*, 514 F.2d at 1230 (and quite probably any other set of guidelines which could be developed by experts), conspiring to import and distribute "hard drugs" must be ranked as a very serious offense. It is the fact that appellant *did* commit a crime of this magnitude which militates against *granting* her an early parole. The Parole Board's failure in some past cases (before the revised rule discussed in *Grasso, supra*) to give an (a) (2) prisoner parole *consideration* at the proper time is no ground for holding that in the instant case an (a) (2) sentence is improper since even if timely consideration is given to parole, the board may not grant an early parole because of the gravity of the offense.

⁶ This Court agreed with the position expressed in *Stroud v. Weger*, 380 F. Supp. 897 (M.D. Pa. 1974) that a record review at or before the one-third point of the prisoner's sentence complied with statutory requirements. On the other hand, the district court in *Grasso v. Norton*, 376 F. Supp. 116 (D. Conn. 1974) (*Grasso II*) and the Seventh Circuit in *Garafola v. Benson*, 505 F.2d 1212 (7th Cir. 1974) have concluded that where an (a) (2) prisoner is continued at his initial hearing beyond the one-third point, he must be given a full institutional hearing at or before the one-third point. (*Grasso, supra*, 520 F.2d at 35-36).

Counsel for appellant next alleges that Judge Dooling failed to fit the "punishment to the offender" and "failed to consider the factors of rehabilitation and reformation." He states that the judge sought to "justify her sentence by comparing it to that he felt compelled to impose upon couriers from Colombia." (Appellant's Brief at 15). Counsel interpolates that the Court "felt constrained" not to accord Mrs. Waddell preferential treatment because of her middle class background.

The record of the three proceedings (May 9, August 21, September 15, 1975) reveals that all the positive and mitigating factors were discussed fully and the court stated several times that it considered all of the factors in determining its sentence. The Court neither acted nor believed it was acting harshly or prejudicially. Rather, the Court held the view that "In a narcotics case this would be regarded as a light sentence for calculated importation in the order and magnitude involved in this conspiracy." (A. 69a).

The Court's statement that most sentences are rooted in cooperation was simply a factual assertion and not a "disparagement" of the importance of cooperation as appellant contends (Appellant's Brief at 16). Mrs. Waddell's cooperation following her apprehension was brought to the Court's attention both at the first sentencing⁷ and also at the hearing on the Rule 35 motion (A. 50a, 53a, 56a). The Assistant United States Attorney stated that Mrs. Waddell was willing to testify should the codefendant be apprehended and that there was "a continuing cooperation beyond and above the areas of testifying before the grand jury." (A. 55a). The Court confirmed that it had taken these statements into account. (A. 30a, 69a).

⁷ Mr. DePetrìs: "I just want to make sure the record is clear that Mrs. Waddell cooperated fully with the Government." (A. 24a).

Finally, appellant raises as highly prejudicial error, a portion of the evaluative summary of the presentence report. The presentence report was submitted to Judge Dooling before he sentenced Mrs. Waddell on May 9, 1975. Counsel for Mrs. Waddell called attention to certain alleged errors in the report in his affidavit of August 8, 1975 supporting a Rule 35 motion (A. 36a-37a).

Paramount among the contested statements was the following on page 25 of the report:

While codefendant Margulis was undoubtedly part of her life during the period of the offense, her extremely active participation in all phases of the smuggling and sale of the drugs by her own admission, makes Margulis a secondary participant.

Defense counsel also refuted the statements at pages 7 and 9 of the report that Mrs. Waddell "delivered some of the drugs to California." This statement was deleted from the report (A. 36a). Finally, Mr. Rooney asserted that the report "distorts this defendant's upbringing and financial picture" (A. 37a), in that her income and property were much less than described in the report at pages 23-24. These details were corrected in the revised copy of the report submitted to Judge Dooling before he denied the Rule 35 motion.

What remains at issue, therefore, is the portrayal of Mrs. Waddell, in the passage quoted above, as the prime mover in the conspiracy to import and distribute drugs.

Counsel for Mrs. Waddell vigorously argued the inaccuracy of the probation report's characterization of his client at both sentence hearings. In addition, the Assistant United States Attorney informed the court that, in the prosecutor's opinion, Mr. Margulis was the "connection" and the "chief of the network . . . and apparently

Mrs. Waddell was giving money for the importation of the cocaine." (A. 53a). "She kept the books of the transactions and assisted in the importation itself." (A. 54a).

When the Assistant United States Attorney offered the opinion that appellant's co-conspirator was the "more culpable party in this matter", the Court commented: "*I have assumed as much.*" (A. 54a, emphasis supplied).

From the facts related on pages 6, 7, 9 of the presentence report, which facts were not claimed to be incorrect, the Probation Department might reasonably conclude that appellant actively participated in two importations of cocaine totalling more than 23 pounds in quantity. Consequently, while there may be disagreement over the opinion that she was the "primary participant" there could be little doubt that she played an active and substantial role in the conspiracy, as a knowing courier, distributor, and financial underwriter. Appellant's contention that she was susceptible to, and unduly influenced by, her co-conspirator at an emotionally difficult period in her life is duly recorded in the presentence report (p. 25) and was completely and repeatedly brought to the attention of the Court by her counsel.

In the face of these facts, it is respectfully submitted that counsel misjudges the perception and compassion of the Court when he states that this "major error had an inevitable adverse impact on the judge" (Appellant's Brief at 23). Counsel further argues that "this warped and highly prejudicial error" in the evaluative summary of the report "no doubt affected the consideration and recommendations of the . . . sentencing panel . . ." (*Id.*). But as this Court has held, the sentencing panel's recommendation is purely advisory and the responsibility ultimately and exclusively resides with the sentencing judge. *United States v. Driscoll*, 496 F.2d 252, 253 (2d Cir. 1974).

What is most significant also is that the Probation Department's evaluation of appellant's role was contradicted not solely by defense counsel but by the Assistant United States Attorney in the statement quoted above, *supra* p. 14. In other words, the Court was fully aware of the Government's opinion of appellant's role in the transaction which led to her apprehension.

To conclude that the experienced judge simply refused to take cognizance of defense counsel's remonstrances and the Government's representations on this point unjustifiably impugns the integrity and intelligence of the Court. See *United States v. Herndon*, 525 F.2d 208, 210 (2d Cir. 1975). In reality, this was a difference of opinion. It does not rise to the level of "misinformation of constitutional magnitude," (*United States v. Tucker, supra*, 404 U.S. at 447; *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970)). The Court was fully aware of the disparity in the evaluation of Mrs. Waddell's role and carefully considered all opinions before determining the sentence (A. 69a).⁸

⁸ . . . The sentence that is being imposed, . . . is much less than would be imposed but for the positive factors brought out by Mr. DePetrìs . . . and what has been said by Mr. Rooney in your behalf. And above all, what Mr. Waddell has said on your behalf." (A. 30a).

CONCLUSION

**The order denying the motion to reduce sentence
should be affirmed.**

Dated: January 26, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 29th day of January 1976 he served ^{two copies} ~~copy~~ of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Goldman & Hafetz, Esqs.

60 E. 42nd Street

New York, N. Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

29th day of January 1976

Oliver S. Morgan
Oliver S. Morgan
Notary Public, State of New York
No. 21-4501966

Qualified in Kings County
Commission Expires March 30, 1977